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No. 86-922

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

Petitioners,

—*v.*—

ANACONDA-ERICSSON INC., ERICSSON, INC., L M ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANKING CORPORATION, CITIBANK, N.A., PRICE WATERHOUSE, SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Court of Appeals' order was consistent with the decisions of the other Courts of Appeals that have addressed similar issues and was a completely appropriate termination of petitioners' repeated abuse of the procedures of that court and the District Court.

STATEMENT

The facts giving rise to the Court of Appeals' decision reflect the ceaseless efforts of plaintiffs' attorneys[1] to multiply judicial proceedings unnecessarily and abusively. This propensity has already resulted in two final decrees enjoining them from prosecuting any further litigation relating to the subject matter of this action. *See Rand* v. *Anaconda-Ericsson Inc.*, 623 F. Supp. 176 (E.D.N.Y. 1985), *aff'd*, 794 F.2d 843 (2d Cir.), *cert. denied*, 107 S. Ct. 579 (1986); *Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985).

The protracted litigation relating to Teltronics Services, Inc., of which this petition is the last gasp, was described in the brief in opposition to the previous petition for certiorari filed by plaintiffs' attorneys in this case, no. 86-598, and is repeated here for the convenience of the Court. The claims asserted in this action are based on the same alleged course of conduct as claims that were dismissed on the merits in four earlier actions prior to the dismissal of this case. *See Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985); *Anaconda-Ericsson Inc.* v. *Hessen (In re Teltronics Services, Inc.)*, 29 Bankr. 139 (Bankr. E.D.N.Y. 1983); *Teltronics Services, Inc.* v. *L M Ericsson Telecommunications, Inc.*, 491 F. Supp. 538 (S.D.N.Y. 1980), *aff'd*, 642 F.2d 31 (2d Cir.), *cert. denied*, 452 U.S. 960 (1981); *Teltronics Services, Inc.* v. *L M Ericsson Telephone Co.*, No. 79 Civ. 1233, slip op. (S.D.N.Y. May 9, 1979).

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1 The caption of the petition misstates the parties to this proceeding. The order of which review is sought dismissed an appeal from a judgment entered solely against plaintiffs' attorneys, Carl E. Person and Walter C. Reid, and solely in favor of defendants Ericsson, Inc., and Nordic American Banking Corporation (Pet. 11a-12a). None of the plaintiffs who are listed as petitioners or the other defendants who are listed as respondents have any interest in the petition. The real parties in interest on whose behalf the petition was filed are, and are referred to herein as, plaintiffs' attorneys.

Before the commencement of this action, but after the dismissal of the claims based on the same alleged course of conduct in three of the prior cases, plaintiffs' attorneys brought an action asserting substantially identical claims on behalf of both Teltronics and Edward M. Beagan, its largest stockholder. The District Court, unanimously affirmed by the Court of Appeals, dismissed the complaint and entered an injunction against Beagan and plaintiffs' attorneys prohibiting further prosecution of claims belonging to Teltronics. *See Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985). In this case, plaintiffs' attorneys attempted to prosecute substantially identical claims on behalf of other Teltronics shareholders. As the District Court noted in denying their motion to reargue, "[p]laintiffs' attorneys have offered no reason why other shareholders (plaintiffs herein) should be treated differently with respect to the same claims." 623 F. Supp. at 190.

On August 30, 1985, the District Court granted defendants' motion for summary judgment (1) dismissing the complaint and (2) enjoining plaintiffs and their attorneys from prosecuting any further litigation relating to Teltronics. The District Court also granted defendants' request for an award of sanctions against plaintiffs' attorneys pursuant to Rule 11 of the Federal Rules of Civil Procedure, in an amount to be determined. 623 F. Supp. 176.

While applications to determine the amount of the sanctions were being considered by the District Court, plaintiffs and their attorneys appealed from the dismissal and injunction. Defendants moved to adjourn the appeal until the determination of the amount of the Rule 11 sanctions so that any appeal from that judgment could be consolidated with the pending appeal, but plaintiffs successfully opposed the motion on the ground that they might not appeal from the judgment for sanctions. *See* 794 F.2d at 850.

The Court of Appeals affirmed the injunction and the dismissal of the complaint, holding that the record "clearly

justifies" the injunction against further litigation, 794 F.2d at 849. The court observed that "[p]laintiffs and their attorneys seem to believe that if at first you don't prevail, sue, sue again." *Id.* Plaintiffs' attorneys also attempted to challenge the award of sanctions, but the Court of Appeals noted that the propriety of the award was not before it due to plaintiffs' successful opposition to defendants' motion for an adjournment to permit consolidation. *Id.* at 850. This Court denied certiorari. 107 S. Ct. 579 (1986).

These proceedings conclusively determined that the prosecution of this action by plaintiffs' attorneys was abusive and improper, and the only remaining issue was the amount of the sanctions to be imposed. In a Memorandum and Order dated February 28, 1986, the District Court determined the appropriate amount of the sanctions under Rule 11 to be $20,000, about one third of the amount requested (Pet. 2a). A judgment was entered against plaintiffs' attorneys in accordance with the decision on March 7, 1986 (Pet. 11a) (the "Rule 11 judgment").

Before the Rule 11 judgment was entered, plaintiffs' attorneys had made a motion for reargument concerning the order on which that judgment was based (Pet. 4). On March 17, while that motion was still pending, they nonetheless made a second motion to vacate the Rule 11 judgment on the ground that the District Court lacked jurisdiction to enter it, ostensibly pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.[2] Plaintiffs' attorneys' argument that this motion did not affect the finality of the Rule 11 judgment or suspend its operation (Pet. 7) is flatly belied by their acknowledgement that they made the motion "to avoid having a personal judgment against them on file in the courts" (Pet. 4). The first motion was denied on March 25 (Pet. 13a-14a).

On March 31, while the second motion was still pending, and long before petitioners could possibly have been concerned that their time to appeal might elapse following the denial of

2 The motion was frivolous for the reason set forth below at 6 n.3.

the first motion, *see* Fed. R. App. P. 4(a)(1), -(4), petitioners attempted to institute simultaneous proceedings in both the District Court and the Court of Appeals by filing a notice of appeal. The District Court denied the second motion to vacate the Rule 11 judgment by an order dated April 8 and entered on April 16, 1986 (Pet. 15a-16a). Plaintiffs' attorneys therefore could have waited until after that decision to appeal without any possible concern that their time to appeal would expire.

Plaintiffs' attorneys never filed a new notice of appeal subsequent to the District Court's denial of the motion to vacate the Rule 11 judgment. Pursuant to a stipulation and order entered in the Court of Appeals on April 28, 1986, the "appeal" was withdrawn subject to reinstatement within 20 days after the determination of the appeal from the injunction and dismissal of the complaint (Pet. 17a). That appeal was decided on July 9, and plaintiffs' attorneys filed a notice purporting to reinstate their appeal on July 18, 1986 (Pet. 20a). On August 21, defendant Ericsson, Inc., made a motion to dismiss the purported appeal for lack of jurisdiction (Pet. 6). After full briefing and oral argument by plaintiffs' attorneys, the Court of Appeals granted the motion without opinion on September 2, 1986 (Pet. 22a).

In this Court plaintiffs' attorneys have continued their program of needlessly multiplying proceedings. They served their first petition for certiorari, seeking review of the decision affirming the dismissal and injunction, on October 7, 1986. This was more than a month after the second appeal was dismissed, but the petition did not mention or seek review of that order. Instead, plaintiffs' attorneys waited until the end of the 90-day period following the dismissal to file the present petition for certiorari to review that order. This unnecessary imposition on the Court and respondents is a sufficient reason in itself to deny the second petition.

SUMMARY OF ARGUMENT

The Court of Appeals' decision involved only one question: Whether, under the particular circumstances of this case, plaintiffs' attorneys filed a valid notice of appeal. The decision that they did not is in accord with the decisions of this Court and the other Courts of Appeals that have addressed similar questions and does not raise any issue meriting review by this Court. In dismissing the appeal for lack of jurisdiction, the Court of Appeals had no occasion to and did not make any decision concerning the second question set forth in the petition, concerning the District Court's jurisdiction to enter a judgment for sanctions during the pendency of an appeal on the merits.[3]

ARGUMENT

I.

THE COURT OF APPEALS' APPLICATION OF RULE 4(A)(4) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that when certain motions are timely served pursuant to Rules 50(b), 52(b) or 59 of the Federal Rules of Civil Procedure:

> "A notice of appeal filed before the disposition of [the motion] *shall have no effect*. A new notice of appeal must

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3 There is in any event no question whatsoever that the District Court had jurisdiction to enter the judgment because it was collateral to the merits and therefore not within the scope of the rule that an appeal divests the District Court of jurisdiction of its subject matter. *See White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 454 (1982); *Masalosalo* v. *Stonewall Insurance Co.*, 718 F.2d 955, 957 (9th Cir. 1983); *Goodman* v. *Heublein, Inc.*, 682 F.2d 44, 47 (2d Cir. 1982); *Obin* v. *District No. 9, Machinists & Aerospace Workers*, 651 F.2d 574, 583-84 (8th Cir. 1981); *Terket* v. *Lund*, 623 F.2d 29, 33-34 (7th Cir. 1980).

> be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above" (emphasis supplied).

This Court has made clear that compliance with Rule 4(a)(4) is mandatory. If a notice of appeal is filed prior to the disposition of a motion subject to Rule 4(a)(4), it is "as if no notice of appeal were filed at all" and "the Court of Appeals lacks jurisdiction to act." The Court of Appeals has no authority to waive the invalidity of a notice of appeal pursuant to the Rule. *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982).

The motions enumerated in Rule 4(a)(4) comprise all the motions to alter or vacate a judgment that must be made no later than 10 days after the judgment is entered. A motion to alter or amend a judgment for certain specified reasons may also be made under Rule 60(b). Rule 60(b) motions are not subject to the 10-day time limit, however, and may be made within a "reasonable time" or within one year, depending on the theory advanced.

While Rule 4(a)(4) does not expressly refer to motions under Rule 60(b), the most recent decisions of the Courts of Appeals are in agreement that any motion filed within 10 days of entry which calls into question the correctness of a judgment, other than a motion pursuant to Rule *60(a)* to rectify purely clerical errors, is functionally a motion under Rule 59(e) and normally should be so treated for purposes of Rule 4(a), regardless of how it is styled. *See, e.g., Charles* v. *Daley*, 799 F.2d 343, 347 (7th Cir. 1986); *Harcon Barge Co.* v. *D&G Boat Rentals, Inc.*, 784 F.2d 665, 669-70 (5th Cir. 1986) (en banc) (Pet. 10); *Bank of California* v. *Arthur Andersen & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983) (Pet. 9); *Venable* v. *Haislip*, 721 F.2d 297, 299 (10th Cir. 1983) (Pet. 9); *Vreeken* v. *Davis*, 718 F.2d 343, 345 (10th Cir. 1983) (Pet. 9); *Lyell Theatre Corp.* v. *Loews Corp.*, 682 F.2d 37, 41 (2d Cir. 1982) (Pet. 10); *Dove* v. *Codesco*, 569 F.2d 807, 809 (4th Cir. 1978). As explained in 9 J. Moore, *Moore's Federal Practice* ¶ 204.12[1], at 4-69 (2d ed. 1986):

> "The caption does not control . . . and a motion labeled under Rule 60(b) but filed within 10 days after the entry of the judgment is pro tanto a motion under Rule 59(b) or (e), and the appeal time runs from the date of the order disposing of the motion."

If no timely notice of appeal is filed after the disposition of such a motion, then the Court of Appeals lacks jurisdiction and any pending appeal must be dismissed. *See Harcon Barge Co.* v. *D&G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir. 1986) (en banc).

This construction of Rule 4(a)(4) is essential if it is to achieve its purposes. The Advisory Committee Notes indicate that there are two reasons why the filing of a valid notice of appeal must await the disposition of motions to alter or amend a judgment made immediately after it is entered. First, it is inefficient and duplicative to commence appellate review of a judgment which is still subject to modification by the District Court. Second, a notice of appeal filed prior to the disposition of the motion would not embrace objections to that disposition and therefore could not bring the entire case before the Court of Appeals for complete and final resolution. Exactly the same consequences would ensue if a party were permitted to initiate an appeal prior to the disposition of a motion made immediately after the entry of a judgment to alter or amend it pursuant to Rule 60(b).

In this case, plaintiffs' attorneys filed a motion to alter or amend the Rule 11 judgment on March 17, 1986, within 10 days of its entry. The motion was ostensibly made pursuant to Rule 60(b)(4), but the relief requested—vacating the judgment for lack of jurisdiction—unquestionably could have been sought by a motion pursuant to Rule 59. *See Vreeken* v. *Davis*, 718 F.2d 343, 345-46 (10th Cir. 1983). Rule 59(e) "has been interpreted as permitting a motion to vacate the judgment, rather than merely change it." 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2817, at 111 (1973); *accord*, *Markert* v. *Swift & Co.*, 173 F.2d 517, 519 (2d Cir. 1949).

Litigants, especially attorneys acting on their own behalf such as plaintiffs' attorneys, should not be permitted to evade the sound principles of judicial administration expressed in Rule 4(a)(4) merely by invoking Rule 60(b) instead of the more appropriate Rule 59.

If there is any division of authority concerning the application of Rule 4(a)(4) to motions that could have been made pursuant to Rule 59 but purport to be made under Rule 60, it has no bearing on this case. The decisions referred to by plaintiffs' attorneys which hold that not all motions which could have been made pursuant to Rule 59 should be treated as such for purposes of Rule 4(a)(4) merely make clear that exceptions may be made when necessary to achieve substantial justice. In *Smith* v. *United States Parole Commission*, 721 F.2d 346, 348 (11th Cir. 1983) (Pet. 9), the Court of Appeals declined to treat a purported Rule 60(b) motion as if it were made pursuant to Rule 59 because the movant was a prisoner proceeding *pro se* and the "recharacterization of the Rule 60 motion would contravene the principle of 'substantial justice'." Similarly, in *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976) (Pet. 10), in which the refusal to recharacterize the motion resulted in the dismissal of the appeal, the Court of Appeals indicated that treating a Rule 60 motion as if it were made under Rule 59 "is at most discretionary" and under the particular circumstances of that case "would be inappropriate," *id.* at 56 n.4.

United States v. *1982 Sanger 24' Spectra Boat*, 738 F.2d 1043 (9th Cir. 1984) (Pet. 9), appears to reflect the same principle although the basis for that decision, in which the Court of Appeals reversed its own earlier decision over a vigorous dissent, is not readily apparent from the opinion. The court attached importance to the facts that the appellee had not disputed its jurisdiction and that the motion and appeal challenged an uncontroverted and "serious procedural irregularity" in the District Court. *Id.* at 1045-46. Neither factor is present in this case.

The Court of Appeals' dismissal of plaintiffs' attorneys' appeal is completely consistent with the view that considerations of substantial justice should be taken into account in characterizing a postjudgment motion. In fact, plaintiffs' attorneys urged the Court of Appeals to follow the discretionary approach suggested in its opinion in *Daily Mirror*, and the order dismissing the appeal provides no ground whatsoever for believing that it did not do so. Plaintiffs' attorneys are not *pro se* litigants who arguably followed a legitimate procedure to challenge the judgment for sanctions. It is a matter of record that they attempted to burden the courts and respondents with completely unnecessary simultaneous proceedings in the District Court and Court of Appeals—precisely the sort of wasteful duplication Rule 4(a)(4) was intended to prevent—and that this procedure represents their deliberate and long standing *modus operandi*.

The decisions to which plaintiffs' attorneys refer can hardly be said to create a "trap for the unwary" (Pet. 9) because they, like all other decisions of the Courts of Appeals, recognize that the party's characterization of a postjudgment motion is not controlling for purposes of applying Rule 4(a)(4). *See*, in addition to the citations in the carry-over paragraph at pages 7-8 above, *United States* v. *1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984); *Smith* v. *United States Parole Commission*, 721 F.2d 346, 348 (11th Cir. 1983); *A.D. Weiss Lithograph Co.* v. *Illinois Abrasive Products Co.*, 705 F.2d 249, 250 (7th Cir. 1983); *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53, 56 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976). No attorney familiar with these decisions would fail to file a notice of appeal following the disposition of any postjudgment motion that could have been made pursuant to Rule 59.

Plaintiffs' attorneys' predicament is not the result of any procedural trap, but of their practice of burdening the courts and respondents with duplicative and repetitious proceedings. Their attempt to proceed simultaneously in two courts reflects an all-too-well established pattern of deliberate multiplication

of proceedings, not an innocent misreading of the rules. The attempted appeal related solely to the amount of the sanctions to be imposed against the same attorneys who were responsible for the improper procedure. No innocent party has been prejudiced on account of their misconduct.

II.

THE COURT OF APPEALS' DETERMINATION THAT THE STIPULATION WITHDRAWING THE INVALID APPEAL DID NOT CONSTITUTE A NOTICE OF APPEAL

Even the most liberal construction of Rule 3 of the Federal Rules of Appellate Procedure cannot sustain plaintiffs' attorneys' contention that they filed a notice of appeal within the 30-day period after the District Court entered its order denying the motion to vacate the Rule 11 judgment. As plaintiffs' attorneys acknowledge (Pet. 11), that period began on April 16, 1986. The only paper filed in this action during the following 30 days was a stipulation and order in the Court of Appeals *withdrawing*, subject to reinstatement, the supposed appeal taken by the notice improperly filed on March 31 (Pet. 17a).

The authorities relied upon by petitioners make clear that the requirement of Rule 3 concerning the filing of a notice of appeal requires even a nonlawyer, *pro se* litigant to make "a positive, substantial and unequivocal effort to discharge it," *Alley* v. *Dodge Hotel*, 501 F.2d 880, 884 (D.C. Cir. 1974) (Pet. 13), and this requirement is hardly satisfied by the accident that petitioners *withdrew* an improperly noticed appeal at the time when they should have been filing a proper notice. Even if there were room for doubt on this point, the Court of Appeals' application of Rule 3 to the particular facts of this case does not merit review by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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February 6, 1987

APPENDIX

Designation of Corporate Relationships

Pursuant to Rule 28.1 of this Court, respondents submit this designation of corporate relationships.

1. Respondent Anaconda-Ericsson Inc. has been renamed Ericsson, Inc. It is a wholly-owned subsidiary of Ericsson North America Inc., which in turn is a wholly-owned subsidiary of L M Ericsson Telephone Company, a Swedish corporation whose shares are publicly held. L M Ericsson Telephone Company has subsidiaries throughout the world, but none of their shares are publicly traded in the United States.

2. Since the commencement of this action, the corporate name of respondent Nordic American Banking Corporation has been changed to DnC America Banking Corporation. DnC America Banking Corporation is wholly owned by Den norske Creditbank, a Norwegian corporation.

3. None of the other parties named as respondents have any interest in the petition. *See* page 2 n.1, *supra*. The corporate relationships of the corporations improperly named as respondents are set forth in the brief in opposition to the first petition for certiorari in this case, no. 86-598.